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No. 03-1162

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

v.

TENNESSEE VALLEY AUTHORITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS TENNESSEE VALLEY PUBLIC POWER ASSOCIATION, MEMPHIS LIGHT, GAS & WATER DIVISION, ELECTRIC POWER BOARD OF CHATTANOOGA, MIDDLE TENNESSEE ELECTRIC MEMBERSHIP CORPORATION, NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION AND VOLUNTEER ENERGY COOPERATIVE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners before this Court are the United States Environmental Protection Agency and Michael O. Levitt, Administrator, United States Environmental Protection Agency.

Respondents are the Tennessee Valley Authority, Tennessee Valley Public Power Association,[1] Memphis Light, Gas & Water Division, Electric Power Board of Chattanooga, Middle Tennessee Electric Membership Corporation, North Georgia Electric Membership Corporation, Volunteer Energy Cooperative, Alabama Power Company, and Duke Energy Corporation.

[1] A complete listing of the current TVPPA members is contained in TVPPA App., pp. 12-18.

DISCLOSURE STATEMENT

Tennessee Valley Public Power Association ("TVPPA") is a non-profit corporation representing the interests of 108 municipal and 50 rural electric cooperative distributors of electrical power in a wide range of activities relating to the Tennessee Valley Authority ("TVA"). Individually-named members Memphis Light, Gas & Water Division, the Electric Power Board of Chattanooga, and 106 other members of TVPPA are boards or divisions of municipal governments in Tennessee, Kentucky, Alabama, Mississippi, Georgia, and North Carolina, all but one of which buy their entire energy and capacity requirements from the TVA. Individually-named members Middle Tennessee Electric Membership Corporation, North Georgia Electric Membership Corporation, Volunteer Energy Cooperative, and 47 other members of TVPPA are non-profit, member-owned electric cooperatives that buy virtually all of their energy and capacity requirements from the TVA.

TVPPA and the named distributors have no parent corporations, and no publicly held company has a 10 percent or greater ownership interest in any of them.

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PRIOR COURT OPINIONS

TVPPA and the named distributors request that this Court deny this Petition for writ of certiorari seeking review of the final judgment of the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") issued on June 24, 2003. The judgment of the Eleventh Circuit is reported as *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) (*TVA II*), reprinted in Pet. App., pp. 1a-50a. An earlier ruling on key jurisdictional issues is reported as *Tennessee Valley Authority v. U.S. E.P.A.*, 278 F.3d 1184 (11th Cir. 2002) (*TVA I*), reprinted in Pet. App., pp. 51a-99a.

STATEMENT OF JURISDICTION

The Petition seeks review of a final judgment issued on June 24, 2003, by the Eleventh Circuit.

STATUTORY PROVISIONS INVOLVED

The Petitioner United States Environmental Protection Agency ("EPA") has included pertinent provisions of the Clean Air Act, 42 U.S.C. §7401, *et seq.*, in the appendix to its Petition.

STATEMENT OF THE CASE

TVPPA and Distributor Respondents

TVPPA is a nonprofit corporation representing the interests of 108 municipal and 50 member-owned, non-profit

electric cooperative distributors of electrical power. (McDowell Aff., ¶ 2, TVPPA App., pp. 1-2; Listing of TVPPA members, TVPPA App., pp. 12-18). All but one of these municipal and cooperative electrical systems purchase virtually all of their energy and power needs from the TVA. They resell this electricity to residents and businesses of the TVA region.[2] This region includes almost all of Tennessee and parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia, and contains a population of nearly 8,000,000 people. (*Id.*) TVPPA represents the interests of its members on a variety of matters relating to the TVA. (McDowell Aff., ¶ 3, TVPPA App., p. 2).

Respondent Memphis Light, Gas & Water Division is an agency of the City of Memphis, Tennessee, and Respondent Chattanooga Electric Power Board is an agency of the City of Chattanooga, Tennessee. Respondents Memphis Light, Gas & Water Division and Chattanooga Electric Power Board are two of the largest municipal purchasers of TVA electric power.

Respondents Middle Tennessee Electric Membership Corporation, North Georgia Electric Membership Corporation, and Volunteer Energy Cooperative[3] are member-owned,

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[2] TVPPA members provide the electricity needs of all of the residents and businesses of the TVA region, except for a few extremely large industrial customers and certain federal facilities that are served directly by the TVA. In the TVA region, TVA is responsible for generation and high-voltage transmission of electricity, while the TVPPA members are responsible for distribution networks that deliver electricity to the ultimate consumers.

[3] The name of this cooperative has changed from "Volunteer Electric Cooperative" since the filing of its petition for review.

non-profit electric cooperatives serving large geographic areas in Tennessee and Georgia. Respondents Middle Tennessee Electric Membership Corporation, North Georgia Electric Membership Corporation, and Volunteer Energy Cooperative are the three largest purchasers of TVA power operating as electric cooperatives.

Proceedings Below and Facts of Case

This "bizarre case"[4] presents a unique set of facts and issues and a conclusion below that provide no need for the Court's review.

This case arose out of an allegation of the EPA beginning in 1999 that efforts by the TVA and other utilities to repair and replace deteriorating equipment violated the Clean Air Act's New Source Review ("NSR") provisions. The EPA initiated the enforcement effort after concluding that power plant maintenance activities undertaken by the utilities over a twenty-year period violated the NSR requirements. The EPA brought civil enforcement actions against all of the targeted utilities other than the TVA. Instead of initiating a civil enforcement action against the TVA, the EPA issued a series of Administrative Compliance Orders ("ACOs") to the TVA under Section 113(a) of the Clean Air Act, 42 U.S.C. §7413(a).

After the sixth amended ACO was issued to the TVA by the EPA, petitions for review were filed by the TVA,

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[4] The characterization is that of the Eleventh Circuit in its discussion of the problem of judicial review of the EPA's attempted use of Administrative Compliance Orders to enforce the requirements of the Clean Air Act. *TVA II*, 336 F.3d at 1251. (Pet. App., p. 28a).

TVPPA, Alabama Power Company and Duke Energy Corporation. After the EPA announced its decision on May 4, 2000 to refuse to stay or withdraw the sixth ACO, the TVA, TVPPA, Alabama Power Company and Duke Energy Corporation filed on May 5, 2000, their second petitions for review of the May 4 ruling. (Pet. App., pp. 54a, n.1, and 90a-98a).[5]

Although the EPA refused to stay the sixth amended ACO, the EPA announced in its May 4, 2000 letter that it would "reconsider" the Compliance Order by creating an unique administrative review procedure to be undertaken by the EPA's Environmental Appeals Board ("EAB") (Hankinson Letter, May 4, 2000, TVPPA App., pp. 8-11). The EAB is comprised of persons appointed by the EPA's Administrator. The EAB appointed an administrative law judge to collect testimony and argument, under a procedure that had never before been used by the EPA.[6] The EPA's May 4 letter stated "while this process is proceeding, the current Order will remain in effect and I fully expect that TVA will comply with its conditions." (*Id.*) The cost to the TVA for complying with the terms of the Compliance Order that would "remain in effect" would exceed one billion dollars ($1,000,000,000). (McDowell Aff., ¶ 7, and Crowell Letter, November 4, 1999, TVPPA App., pp. 4-7).

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[5] The 158 non-profit municipal and cooperative utilities that comprise the TVPPA purchase virtually all of their power requirements from the TVA and would be principally responsible for paying for costs that TVA would incur for additional emissions control measures demanded by the EPA. *TVA I*, 278 F.3d at 1208. (Pet. App., pp. 96a-98a).

[6] The administrative law judge later described his task as "an invented . . . ad hoc procedure . . . [that was] not described in any rule or regulation or statute." (Pet. App., p. 18a).

This additional cost would require a 14 percent increase in electricity rates charged TVPPA members, and could limit economic growth in the TVA region. (*Id.*)

The EPA's "invented . . . ad hoc procedure" had procedural limitations that robbed the proceeding of any fundamental fairness. (*TVA II*, 336 F.3d at 1245-47). (Pet. App. pp., 16a-19a). Predictably, the unique proceeding resulted in the issuance of what the EPA described as a "final adjudication,"[7] restating most of the substantive requirements imposed by the first six ACOs. Petitions challenging the EAB Order were timely filed by the TVA, TVPPA, TVPPA members Memphis Light, Gas & Water Division, Electric Power Board of Chattanooga, Middle Tennessee Electric Membership Corporation, North Georgia Electric Membership Corporation, and Volunteer Energy Cooperative (hereinafter "TVPPA Respondents"), as well as by interconnected utilities Alabama Power Company and Duke Energy Corporation.

In an initial opinion (*TVA I*),[8] the Eleventh Circuit held that the EAB Order was a final agency action by the EPA and that the dispute between the EPA and the TVA was justiciable, in spite of the arguments to the contrary by the EPA and the Attorney General. The Court corrected the EPA's misimpression that it could not bring a civil enforcement action against the TVA because of the TVA's status as a federal corporation. The Court of Appeals held that the TVPPA Respondents and the interconnected utilities had standing to bring their separate petitions for

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[7] *See* the Eleventh Circuit's discussion of this "final adjudication" by the EAB at *TVA II*, 336 F.3d at 1245-47. (Pet. App., pp. 16a-19a).

[8] *TVA I*, 278 F.3d 1184 (Pet. App., pp. 51a-99a).

review. *TVA I*, 278 F.3d at 1205-09. (Pet. App., pp. 89a-98a).

In a second opinion after further briefing and argument (*TVA II*),[9] the Eleventh Circuit held that the EPA's unique use of ACOs as an enforcement tool against the TVA was unconstitutional, because there was no meaningful opportunity for the TVA and others affected by the ACOs to challenge whether the conduct underlying the ACO actually took place or whether the alleged conduct amounted to a Clean Air Act violation. Thus, the Court of Appeals held that the unconstitutional EPA ACO was not a final order that could be enforced or that could be the subject of a petition for review. The Eleventh Circuit dismissed the petitions for review and taxed costs against the TVA and the other petitioners. *TVA II*, 336 F.3d at 1260. (Pet. App. p. 46a).

SUMMARY OF THE ARGUMENT

The Petition for writ of certiorari should be denied because it seeks review of a fact situation and EPA enforcement procedures that are unique and are not likely to be repeated. This "bizarre case" has no general application to the EPA's enforcement authority or procedures.

The Petition's second and third issues presented for review, concerning the justiciability of the case and the TVA's independent litigating authority, do not even need to be reached for the Court to conclude its review of the

[9] *TVA II*, 336 F.3d 1236. (Pet. App., pp. 1a-50a).

merits of this case. The presence of TVPPA and its named members, and of Alabama Power Company and Duke Energy Corporation, ensure that this litigation would go forward even without the presence of the TVA in the case. Consequently, review of these issues should be denied as well.

REASONS FOR DENYING THE PETITION

I. This "Bizarre Case" Will Have No General Impact on the EPA or Those it Regulates.

The unique enforcement strategy pursued by the EPA against the TVA has not been applied by the EPA in enforcement actions initiated against other utilities for similar alleged violations of the EPA's New Source Review ("NSR") regulations.[10] Indeed, since the EPA initiated its NSR enforcement actions in 1999, the EPA has issued new NSR regulations under which the TVA actions that were challenged by the EPA unquestionably would be lawful.[11] Assuming that the new EPA interpretation of the Clean Air Act's NSR requirements survives a pending challenge, there would be no basis for the EPA's initiation of new enforcement actions under its previous NSR interpretations. Nevertheless, should the EPA believe it appropriate

[10] *See, e.g., United States v. Duke Energy Corporation*, 278 F.Supp. 2d 619 (M.D. N.C. 2003) and *United States v. Ohio Edison Co.*, 276 F.Supp. 2d 829 (S.D. Ohio 2003).

[11] 68 Fed.Reg. 61,248-61,280 (October 27, 2003). The new NSR Regulations are being challenged in litigation pending in the District of Columbia Court of Appeals. *State of New York, et al. v. United States Environmental Protection Agency*, Docket No. 02-1387.

to continue its prior assertion that the TVA has violated NSR requirements through past maintenance activities, the Eleventh Circuit clearly held that the EPA can bring a civil enforcement action against the TVA, just as it has done against many other utilities.[12] The EPA has no need to use the ad hoc and inadequate ACO procedure that the Eleventh Circuit found constitutionally wanting.[13]

The EPA acknowledged in the proceeding below that its normal procedure was to use an ACO as a vehicle for asserting its position concerning the existence and nature of a Clean Air Act violation. If the subject of the ACO disagreed with the EPA's position, the EPA would bring a civil enforcement action under 42 U.S.C. §7413(b). *TVA II*, 336 F.3d at 1239 n.2, 1245 n.19, and 1260-61 (Barkett concurring). (Pet. App., pp. 2a, 14a-15a, and 46a-49a). This is precisely the procedure that the EPA can continue to pursue under the decision of the court below.

The EPA sought to single out the TVA for the application of a unique enforcement procedure. The decision below addresses no EPA enforcement authority or procedure that has ever been applied to any other party. *TVA II*, 336 F.3d at 1246. (Pet. App., p. 18a). The decision simply and correctly held that the EPA cannot use the "ad hoc . . .

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[12] *TVA I*, 278 F.3d 1184 (11th Cir. 2002). (Pet. App., pp. 51a-99a).

[13] The EPA explained that it normally uses the ACO to assert its position on an enforcement issue. "In most instances, if a recipient disputes or defies the [ACO], the EPA can choose to bring a judicial enforcement action." *TVA II*, 336 F.3d at 1245, n.19. (Pet. App., pp. 14a-15a). The EPA asserted that it invented a unique, new procedure for its dispute with the TVA, because of its belief that it could not bring a civil enforcement action against the TVA.

invented" procedure that deprived the TVA and the other Respondents of their rights to meaningful due process. This "bizarre case" established no principle of general application, other than the principle of fairness.

The EPA achieved the result that it sought below, the dismissal of the petitions challenging its ACOs, because the ACOs were not final agency actions. This Court should not grant the Petition simply to permit the EPA to challenge the reasoning that the Eleventh Circuit used in reaching the result that the EPA sought.

II. The Court Should Not Grant Certiorari to Address the Petition's Second and Third Questions Because These Issues Apply to Only One of Nine Respondents, and Resolution of the Issues Would Not Affect the Rights and Standing of the Other Respondents.

The Petition cites as its second question presented for review whether a dispute between two executive branch agencies, such as the TVA and the EPA, presents a justiciable case or controversy. The third question presented in the Petition is whether the TVA has independent litigating authority to bring this case. Neither of these issues should be the basis for the Court's grant of certiorari, because of the presence in this case of the TVPPA Respondents and the interconnected utilities, Alabama Power Company and Duke Energy Corporation. Each of these non-TVA Respondents was held to have independent standing to challenge the EPA's orders. *TVA I*, 278 F.3d at 1205-09. (Pet. App., pp. 89a-98a).

As the Supreme Court has previously held, the existence of a justiciable controversy between at least two of

the parties ensures that the case satisfies the Article III requirements. *See, e.g., Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329-30 (1999); and *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 303-305 (1983) (holding that presence of one party with standing assures that controversy before the court is justiciable). Even if the TVA were no longer a party to this litigation, the action would have proceeded because of the injury caused by the EPA's actions to the TVPPA Respondents, Alabama Power Company, and Duke Energy Corporation.

The Eleventh Circuit correctly found that the TVPPA Respondents and the named distributors (and Alabama Power Company and Duke Energy Corporation) satisfied the constitutional and prudential standing requirements. *TVA I*, 278 F.3d at 1205-09. (Pet. App., pp. 89-98). In its Petition, the EPA did not present the Eleventh Circuit's ruling on the issue of standing as a question for review, thus conceding the Eleventh Circuit's conclusions concerning the standing of the non-TVA parties.

The record below was clear that the TVPPA Respondents have standing to pursue correction of the EPA enforcement action that significantly harmed their interests. TVPPA and its members submitted to the Eleventh Circuit the affidavit of Michael McDowell with attachments in support of their position on this issue (McDowell Aff., TVPPA App., pp. 1-4). This evidence was unchallenged and uncontroverted by the EPA.

The record below established not only the standing of the individual TVPPA members, but also the representational standing of TVPPA. TVPPA represents the interests of the named distributors and its other members in a wide

range of activities relating to the TVA. (McDowell Aff., ¶ 3, TVPPA App, p. 2). For example, several TVPPA committees (comprised of TVPPA member system representatives) are operated under the direction of the TVPPA Board of Directors, including (a) TVPPA's Rates & Contracts Committee, which handles matters relating to terms, conditions and rates of the power supply contracts between TVPPA member systems and the TVA; (b) TVPPA's Power Supply Planning Committee, which handles matters relating to short and long-term power supply issues with the TVA; and (c) TVPPA's Governmental Relations Committee, which handles matters relating to state and federal legislation impacting the TVA and TVPPA member systems. (*Id.*) TVPPA is actively involved in other matters relating to the TVA as well. These petitions for review filed by TVPPA are germane to and consistent with the long-standing involvement of TVPPA in representing its members in matters relating to the TVA. (*Id.*)

The TVA is a federal corporation created by the TVA Act of 1933, as amended, 16 U.S.C. §831, *et seq.* (the "TVA Act"). Under the TVA Act, the TVA has a statutory obligation to provide power at rates that are as low as feasible. 16 U.S.C. §831n-4(f). At the same time, the TVA Act requires the TVA to charge adequate rates for the energy and capacity that it supplies. (*Id.*) The TVA power system is financed through the issuance of revenue bonds, which are not obligations of the United States, and from power revenues; and it receives no federal appropriations for its programs. 16 U.S.C. §831n-4.

One hundred fifty-eight (158) TVPPA member systems have entered into long-term wholesale power and supply contracts with the TVA that require each system to

purchase all of its requirements of energy and capacity from the TVA. (McDowell Aff., ¶ 4, TVPPA App., pp. 2-3).[14] In fiscal year 1999, TVPPA members purchased 100 percent of their electric energy requirements from the TVA, representing approximately 83 percent of the electric energy produced by the TVA. (McDowell Aff., ¶ 4, TVPPA App., pp. 2-3). Under these long-term all-requirement contracts, the TVA has the right to adjust or change wholesale and retail rates during the term of the contract in order to assure the TVA's ability to continue to supply the power requirements of the TVPPA member systems and the TVA's other customers on a financially sound basis. (McDowell Aff., ¶ 5, TVPPA App., p. 3).

One hundred and eight (108)[15] members of TVPPA are municipal governments in Tennessee, Kentucky, Alabama, Mississippi, and North Carolina that buy energy and capacity from the TVA. (McDowell Aff., ¶ 6, TVPPA App., pp. 3-4). These municipal governments rely upon the availability of low-cost electricity purchased at wholesale from the TVA to assist them in economic development efforts. (*Id.*) These municipal governments, and the communities they represent, would suffer an economic disadvantage compared to other communities by the increase in the TVA's power costs if the TVA were required

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[14] The number of TVPPA member systems has changed due to a merger of two systems since the filing of Mr. McDowell's affidavit, and now numbers 158.

[15] *See*, footnote 14. There are currently 58 municipal members of TVPPA.

to comply with the EPA ACOs.[16] (*Id.*) This economic disadvantage also is concrete and imminent.

The costs of compliance with the EPA ACOs that TVPPA members would be statutorily and contractually obligated to pay and the economic disadvantage that TVPPA members would suffer through increased rates constitute the concrete and imminent injury to TVPPA members that TVPPA Respondents sought to redress in the petitions filed below.[17]

Therefore, because TVPPA and the named distributors are proper parties in this litigation, the Supreme Court need not even consider whether the dispute between the TVA and the EPA would present a justiciable case or controversy if the TVA and the EPA were the only parties. Likewise, the Court need not consider whether the TVA has independent litigating authority to have brought the case below, because eight other parties, including the TVPPA Respondents, unquestionably had standing and the legal right to pursue this litigation. The procedural posture of this case makes the review of either of these latter two issues unnecessary. Accordingly, the Petition should be denied.

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[16] *See, Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984 (6th Cir. 1998).

[17] The Eleventh Circuit found that the increased rates that TVPPA members would have to pay conferred standing on TVPPA Respondents. Consequently, the Eleventh Circuit did not need to consider whether the economic disadvantage to be suffered by communities would also confer standing. *TVA I*, 278 F.3d at 1209 n.32. (Pet. App., p. 98a).

CONCLUSION

The TVPPA Respondents respectfully request that the Petition for Writ of Certiorari filed by the EPA be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TENNESSEE VALLEY PUBLIC POWER ASSOCIATION, Petitioner v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and JOHN H. HANKINSON, JR., Regional Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IV, Respondents	Docket No. 00-12349-E

AFFIDAVIT OF MICHAEL MCDOWELL

STATE OF TENNESSEE:
COUNTY OF HAMILTON:

Comes the Affiant, being duly sworn, deposes as says as follows:

1. My name is Mike McDowell. I am over 18 years of age and have personal knowledge of all matters set forth herein.

2. I am the Executive Director and Chief Custodian of Records of the Tennessee Valley Public Power Association ("TVPPA"). TVPPA, a Tennessee non-profit corporation, represents the interests of the 110 municipal and 50 rural electric cooperative distributors of electrical power listed on *Attachment 1*. All but one of these municipal and

cooperative electrical systems distribute and sell power purchased from TVA to the residents and businesses of the TVA area. This area includes almost all of Tennessee and parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia, and contains a population of nearly 8,000,000.

3. TVPPA represents the interests of its members in a wide range of activities relating to TVA. For example, several TVPPA Committees (comprised of TVPPA member system representatives) operate under the direction of the TVPPA Board of Directors, including (a) TVPPA's Rates and Contracts Committee, which handles matters relating to the terms, conditions and rates of the power supply contracts between TVPPA member systems and TVA; (b) TVPPA's Power Supply Planning Committee, which handles matters relating to short term and long term power supply issues with TVA; and (3) TVPPA's Governmental Relations Committee, which handles matters relating to state and federal legislation impacting TVA and TVPPA member systems. TVPPA is actively involved in other matters relating to TVA as well. These Petitions for Review are germane to and consistent with the long-standing involvement of TVPPA in representing its members in matters relating to TVA.

4. One hundred fifty-nine (159) TVPPA member systems have entered into long term wholesale power supply contracts with TVA that require each system to purchase all of its requirements of energy and capacity from TVA, with the remaining one member being eligible to purchase wholesale power from TVA but not doing so presently. Copies of the wholesale power contract entered into by TVA with TVPPA members Memphis Light, Gas & Water, Joe Wheeler Electric Membership Corporation, and

the Metropolitan Government of Nashville and Davidson County are attached as *Attachment 2* to my Affidavit. The wholesale power contracts of other TVPPA are substantially similar to those included in *Exhibit 2*. While TVA has recently given TVPPA member systems a limited opportunity to arrange for the purchase of small blocks of power from sources other than TVA for transmission into the TVA system, to date no purchases have been made under that program. During the latest TVA fiscal year, TVPPA members purchased one hundred percent (100%) of their electric energy requirements from TVA, representing approximately eighty-three percent (83%) of the electric energy produced by TVA. TVA's remaining output of electric energy is purchased by very large industrial customers directly served by TVA, by federal agencies, and by others located in the same service area as TVPPA members and which have a major impact upon the economy and welfare of the region served by TVA and TVPPA members.

5. Under these long-term all-requirements contracts, TVA has the right to adjust or change wholesale and retail rates during the term of the contract in order to assure TVA's ability to continue to supply the power requirements of the TVPPA member systems and TVA's other customers on a financially sound basis, including the objective that power shall be sold at rates as low as feasible. As a result, TVPPA member systems and the customers that they serve are ultimately responsible for paying for most of the increases in TVA's costs resulting from TVA's compliance with the EPA Order.

6. One Hundred Nine (109) members of TVPPA are municipal governments in Tennessee, Kentucky, Alabama, Mississippi, Georgia, and North Carolina that buy energy

and capacity from TVA. These municipal governments rely upon the availability of low-cost electricity purchased at wholesale from TVA to assist them in economic development efforts and will suffer an economic disadvantage compared to other communities if TVA complies with the EPA Order and TVA's power costs are increased. Businesses, particularly small businesses, farmers, residential ratepayers, and municipalities that receive their electric service from TVPPA member systems organized and operating as rural electric cooperatives also will be substantially and adversely affected by compliance with the EPA Order.

7. TVPPA requested information from TVA relating to the financial impact of compliance with the EPA Order and was furnished a copy of the report submitted by TVA to various members of Congress which is attached as *Attachment 3* to my Affidavit.

/s/ Michael McDowell
Michael McDowell

STATE OF TENNESSEE:
COUNTY OF HAMILTON:

Sworn to and subscribed before me this 24 day of July, 2000.

WITNESS my hand and notarial seal at my office in Chattanooga, Tennessee, this ___ day of July, 2000.

/s/ Marilyn Sartin
Notary Public

My commission expires: 3/7/01

[LOGO] **ATTACHMENT 3**

Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1499

Craven Crowell
Chairman, Board of Directors

November 4, 1999

The Honorable Fred Thompson
United States Senate
523 Dirksen Senate Office Building
Washington, DC 20510-4204

Dear Fred:

Yesterday, the Environmental Protection Agency announced that it was taking action to require the installation of new pollution control equipment on coal fired power plants operated by seven private utilities and TVA. We wanted to share with you TVA's views on this action.

TVA agrees with EPA that pollution from coal-fired power plants must be reduced further if the Tennessee Valley region and the rest of the nation are to continue to improve air quality. In fact, last summer TVA became the nation's first utility to implement an aggressive NOx reduction strategy which includes installing state-of-the-art pollution controls on TVA's largest coal plants. This enormous investment will help reduce ozone problems in the Smokies, allow continued purchases of Kentucky coal, and help Valley states meet their ozone reduction strategies while allowing continued industrial and economic development.

So while we support EPA's goal, we disagree with their means of achieving it.

All utilities, including TVA, routinely repair and replace broken equipment at their plants. It is through such activities that we are able to maintain reliable electric service to the public and why, last summer, TVA was able to meet record demands for electricity in the Valley without interrupting service. EPA is now saying that such maintenance practices trigger the requirement to install controls designed for new power plants. This is a dramatic change in how EPA has applied these requirements in the past. Under this new interpretation, EPA says that 80 to 90 percent of the utility industry is in violation of its new source control regulations because of maintenance projects over the last 20 years.

At TVA, the total cost of complying with this regulation could exceed $1 billion. Indeed, the combination of capital costs, interest expense, and ongoing operating expenses would require a 14-percent rate increase. The increased costs for every business and residence in the region could limit economic growth.

Not only does this new interpretation threaten our ability to continue to maintain reliable operation of our units, but it potentially limits our ability to put controls where they will do the most good. In the pollution reduction plan we announced last summer, we put control equipment on plants that would most help meet the needs of the region, such as the efforts by Memphis, Tennessee, and Louisville, Kentucky, to meet EPA's air quality health standards, and to address the problems in the Smokies. Under EPA's approach, controls would be installed on plants where EPA thinks it can make its

best legal case – without regard to the region's air quality problems.

We hope to be able to work with EPA on a resolution that will allow us to continue to reduce TVA's emissions where and how it makes the most sense. We also want to reach a resolution that will allow us to maintain unit reliability and to continue to fully meet the public's need for electricity. It is also important that any resolution treats TVA and our ratepayers no differently than other utilities and their ratepayers.

I appreciate this opportunity to share our views with you and will keep you informed of further developments.

Sincerely,

/s/ Craven
Craven Crowell

[LOGO]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

May 4, 2000

Via Fax and overnight mail

Mr. Edward S. Christenbury
General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1499

Dear Mr. Christenbury:

On November 3, 1999, the Environmental Protection Agency ("EPA") issued an Administrative Compliance Order to the Tennessee Valley Authority ("TVA") pursuant to Sections 113 and 167 of the Clean Air Act ("Act"). In that Order and its subsequent amendments (collectively, the "Order"), EPA identified numerous violations of New Source Review ("NSR") and New Source Performance Standards ("NSPS") of the Clean Air Act and required that TVA conduct certain actions to rectify these violations. As provided in Section 113(a)(4) of the Act, TVA requested a conference with me to discuss the Order and its allegations and a meeting was held on December 20, 1999. At that meeting, TVA requested that EPA reconsider and stay the Order based on the facts and legal analysis presented by TVA during the meeting and the detailed written response

submitted to EPA, entitled "TVA response to administrative order."

Over the past four months, EPA has met with TVA to attempt resolution of the differences between our two agencies regarding the allegations and actions required by the Order. Based on the discussions to date, we have not been able to reach a negotiated settlement addressing EPA's allegations. In addition, our agencies have not been able to agree upon a dispute resolution process that would provide an analysis of the factual and legal issues currently in contention in a time frame consistent with the Act. As you are aware, Section 113(a)(4) of the Clean Air Act requires that an order issued under this section shall require the person to whom it was issued to comply with the requirement within one year of issuance and that the administrative order shall be nonrenewable.

I am hereby granting your request to reconsider the Administrative Compliance Order. It is my understanding that, based on my request, the Administrator has directed the EAB to conduct the reconsideration proceedings by completing the factual record collection on August 1, 2000, and by rendering a decision, including findings of fact and conclusions of law, no later than September 15, 2000. I realize that TVA has requested the opportunity for oral testimony to be included in the record and the EAB will provide for such an opportunity. While this process is proceeding, the current Order will remain in effect and I fully expect that TVA will comply with its conditions. Compliance with the Order while the administrative process is ongoing is not burdensome to TVA because compliance in the interim will not require any capital expenditures by TVA before

the rendering of a decision on TVA's challenges to the Order on September 15th.

The EAB has been asked to schedule an initial conference with TVA and the EPA enforcement staff as soon as possible to discuss scheduling of information exchange and the upcoming hearing in July. We intend to propose the following schedule to the EAB at the initial conference: (1) by no later than May 31, 2000, EPA will provide to TVA a core set of documents relevant to the Order and the issues set forth by TVA on December 20, 1999; (2) between the date of this letter and June 30, 2000, TVA and EPA enforcement staff may exchange document requests and interrogatories, and take depositions of persons who may have information relevant to the factual and legal issues surrounding the Order; (3) on or about July 15th, a hearing no longer than six days shall occur to adduce relevant oral testimony; and (4) no later than July 31st, the parties shall proffer documents and hearing transcripts that form the basis of their legal and factual arguments as well as legal memoranda in support of their claims. Of course there is no assurance that the EAB will accept our proposed schedule.

This process will provide a fair opportunity for each agency to present the central facts and legal arguments to a forum with expertise in this area. In addition, this process satisfies both TVA's requests for an opportunity to conduct discovery of EPA and an opportunity to present oral testimony relating to its contentions. When this process is complete, both EPA and TVA will have had the opportunity to understand each other's claims and the basis for those claims, and the EAB will have rendered a decision on the merits of those claims.

Members of your staff may contact Gary Guzy, General Counsel for EPA, to discuss the details of the federal administrative dispute resolution process set forth in this letter until the initial scheduling conference with the EAB. Although this process will involve the commitment of substantial resources by both our agencies, I believe that the end result will be a full and complete record and a fair and reasoned decision on the issues surrounding EPA's Administrative Compliance Order.

Sincerely,

/s/ John H. Hankinson, Jr.
John H. Hankinson, Jr.
Regional Administrator

cc: Steve Herman, Assistant Administrator
Office of Enforcement & Compliance Assurance
Gary Guzy, General Counsel for EPA

TVPPA Member List As of March 22, 2004:

COMPANY	General Manager
Aberdeen Electric Department	Donald M. Jackson
Albertville Municipal Utilities Board	Larry Harvey
City of Alcoa Electric Department	Eddie Tramel
Alcorn County Electric Power Association	James D. Nanney, Jr., CPE
Amory Water & Electric	Tony Swan
Appalachian Electric Cooperative	William A. Underwood
Arab Electric Cooperative, Inc.	Joe Van Bunch
City of Athens Electric Department	Gary Scroggins
Athens Utilities Board	Eric Newberry
Benton County Electric System	Gary L. Stone, CPE
Benton Electric System	Gray Cassity
Bessemer Electric Service	Charles W. Nevins, CPE
Blue Ridge Mountain Electric Membership Corporation	Roy G. Satterfield, Jr.
Bolivar Electric Department	John Fortune, AdvCPE
Bowling Green Municipal Utilities	Larry V. Miller, P.E.
Bristol Tennessee Electric System	Dr. R. Michael Browder, P.E
Brownsville Utility Department	John F. Sharpe, CPE
Caney Fork Electric Cooperative, Inc.	Hubert A. King, III
Carroll County Electric Department	Lynn D. Compton
Central Electric Power Association	Paul D. Long
Electric Power Board of Chattanooga	H.E. DePriest
Cherokee Electric Cooperative	Jimmy Reeves
Chickamauga Electric System	John Culpepper
Chickasaw Electric Cooperative	Paul Harris
Clarksville Department of Electricity	Kenneth W. Spradlin, AdvCPE

COMPANY	General Manager
Cleveland Utilities	Tom Wheeler
Clinton Utilities Board	Greg Fay
Columbia Power & Water Systems	James O. Clark, CPE
Columbus Light & Water	Fred M. Hayslette, CPE
Cookeville Electric Department	Tony Peek, CPE
Courtland Electric Department	Prentiss Morris
Covington Electric System	Robert D. Hagewood, CPE
Cullman Electric Cooperative	Grady Smith
Cullman Power Board	Mike Manning, CPE
Cumberland Electric Membership Corporation	Carl W. Wilson
City of Dayton Electric Department	Frank Welch
Decatur Utilities	Kem Carr
Dickson Electric Department	James E. Peeler
Duck River Electric Membership Corporation	James M. Allison
Dyersburg Electric System	Jimmy Williamson
East Mississippi Electric Power Association	Albert M. Guy, Jr.
Elizabethton Electric System	David Phillips Isaacs
Erwin Utilities	Howard C. Brown, AdvCPE
Etowah Utilities	Gene Fulbright
Fayetteville Public Utilities	Wayne D. Landreth
City of Florence Utilities	Jack M. Hilliard
Forked Deer Electric Cooperative	Harold Willis
Fort Loudoun Electric Cooperative	Robert R. Long, CPE
Fort Payne Improvement Authority	Danny Brisendine, PE
4-County Electric Power Association	Allegra Brigham

COMPANY	General Manager
Franklin Electric Cooperative	A.H. Akins
Franklin Electric Plant Board	Larry K. Musick, P.E.
Fulton Electric System	David T. Moss
Gallatin Department of Electricity	William Draper, CPE
Gibson Electric Membership Corporation	Daniel Rodamaker
Glasgow Electric Plant Board	William J. Ray
Greeneville Light & Power System	William M. Carroll, AdvCPE
Guntersville Electric Board	Larry Brown
Harriman Utility Board	Charles B. Flora, III, CPE
Hartselle Utilities	George Adair
Hickman Electric Plant Board	James H. Eakes
Hickman-Fulton Co. Rural Electric Cooperative Corp.	Greg Grissom
Holly Springs Electric Department	Thomas M. Boone, Jr.
Holston Electric Cooperative	Larry E. Elkins
Hopkinsville Electric System	Austin B. Carroll, CPE
Humboldt Utilities	Stan Little
Huntsville Utilities	William C. Pippin
Jackson Energy Authority	John W. Williams
Jellico Electric and Water Systems	John W. Leach
Joe Wheeler Electric Membership Corporation	George Kitchens
Johnson City Power Board	Homer G'Fellers
Knoxville Utilities Board	Mintha E. Roach
LaFollette Utilities Board	Walter M. (Kenny) Baird, Jr.
Lawrenceburg Utility Systems	Ronnie Cato
Lenoir City Utilities Board	Kenneth Dutton
Lewisburg Electric System	Richard Turner
Lexington Electric System	Ronnie Davis
Loudon Utilities	W. Barry Baker

COMPANY	General Manager
Louisville Utilities	Tommy L. Kirkpatrick
City of Macon Electric Cooperative	Richard Schimmel
Marshall-DeKalb Electric Cooperative	James W. Stewart
City of Maryville Electric Department	Baron Swafford
Mayfield Electric & Water System	Marty Ivy
McMinnville Electric System	Rodney Boyd
Memphis Light, Gas & Water Division	Dr. James L. Netters
Meriwether Lewis Electric Cooperative	Harold G. Womble
Middle Tennessee Electric Membership Corporation	Frank Jennings
Milan Department of Public Utilities	David E. Scarbrough, CPE
Monroe County Electric Power Association	Hubert Elliott
Monticello Electric Plant Board	Gary E. Dishman
Morristown Utility Commission	William G. Swann
Mountain Electric Cooperative, Inc.	Joseph A. Thacker, III CPE
Mount Pleasant Power System	Charles Gandy
Murfreesboro Electric Department	Larry D. Kirk, CPE
Murphy Power Board	John Carringer
Murray Electric System	Anthony V. (Tony) Thompson
Muscle Shoals Electric Board	Rickey Thomas, AdvCPE
Nashville Electric Service	Donald Kohanski
Natchez Trace Electric Power Association	Joe F. Boehms
New Albany Light, Gas & Water	Harold G. Smith
Newbern Electric Water & Gas	Rosalind Green

COMPANY	General Manager
Newport Utilities Board	John Leland (Lee) Baker, CPE
North Alabama Electric Cooperative	Bruce L. Purdy
North East Mississippi Electric Power Association	Robert A. Collier
North Georgia Electric Membership Corporation	Ron Hutchins
Northcentral Mississippi Electric Power Association	Kevin Doddridge
Oak Ridge Electric Department	Jack Suggs
City of Okolona Electric Department	Michael E. Parker
City of Oxford Electric Department	Lynn Robbins
Paducah Power System	David Clark, CPE
Paris Board of Public Utilities	Charles R. Perry, AdvCPE
Pennyrile Rural Electric Cooperative Corporation	Eston Glover, AdvCPE
Philadelphia Utilities	John D. Burt, CPE
Pickwick Electric Cooperative	Karl Dudley, CPT, CPE
Plateau Electric Cooperative	John B. Seale, Jr., AdvCPE
Pontotoc Electric Power Association	Chuck Howell, CPE, CPSv
Powell Valley Electric Cooperative	Randell Myers
Prentiss County Electric Power Association	Ronny Rowland, AdvCPE
Princeton Electric Plant Board	John Humphries, P.E.
Pulaski Electric System	Ron Holcomb
Ripley Power and Light	Mike Allmand
Rockwood Electric Utility	Kendall Bear

COMPANY	General Manager
Russellville Electric Board	Steve DeFoor
Russellville Electric Plant Board	Larry S. Wilcutt
Sand Mountain Electric Cooperative	Michael D. Simpson
Scottsboro Electric Power Board	James B. Sandlin, AdvCPE
Sequachee Valley Electric Cooperative	Robert W. Matheny
Sevier County Electric System	Howard E. Murrell
Sheffield Utilities	Jimmy Barnett, CPE
Shelbyville Power System	David Crowell, CPE
Smithville Electric System	James C. Wall
Town of Somerville Utility Department	Robert Glover
Southwest Tennessee Electric Membership Corporation	Jack Fox, CPE
Sparta Electric & Water System	Wayne Rogers, CPE
Springfield Department of Electricity	Robert A. Gardner
Starkville Electric System	Edd Hattaway
Sweetwater Utilities Board	Robert S. Bettis
Tallahatchie Valley Electric Power Association	Tom W. Underwood, Jr., CPE
Tarrant Electric Department	Rayburn Phillips
Tennessee Valley Electric Cooperative	Charles Bevis
Tippah Electric Power Association	Sam Buchanan, CPE
Tishomingo County Electric Power Association	Robert F. Grisham
Tombigbee Electric Power Association	William W. Long
Trenton Light & Water Department	Bret M. Fisher, AdvCPE

COMPANY	General Manager
Tri-County Electric Membership Corporation	Paul Thompson
Tri-State Electric Membership Corporation	David J. Falls, CPE
Tullahoma Board of Public Utilities	Joe Loggins, P.E., CPE
City of Tupelo Light & Water	Johnny N. Timmons
Tuscumbia Electricity Department	David B. Thornton
Union City Electric System	Jerry Bailey, CPE
Upper Cumberland Electric Membership Corporation	Carl V. Brandt
Volunteer Energy Cooperative	William M. Buchanan
Warren Rural Electric Cooperative Corporation	Gerald W. Hayes, CPE
City of Water Valley Electric Department	Eddie Magee, CPSv
Weakley County Municipal Electric System	Faron L. Collins
West Kentucky Rural Electric Cooperative Corporation	David Smart
City of West Point Electric System	Dewel Brasher
Winchester Utilities	Billy D. Garner

(6)

Supreme Court, U.S.
FILED
APR 14 2004
OFFICE OF THE CLERK

No. 03-1162

In the Supreme Court of the United States

MICHAEL O. LEAVITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ANNA WOLGAST
Acting General Counsel
Environmental Protection Agency
Washington, D.C. 20460

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In the Supreme Court of the United States

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MICHAEL O. LEAVITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that "[t]he statutory scheme established by Congress" on the basis of which the Environmental Protection Agency (EPA) issued its Administrative Compliance Orders (ACOs) in this case "is repugnant to the Due Process Clause of the Fifth Amendment," Pet. App. 43a, and separation-of-powers principles, *id.* at 44a. Because of that constitutional holding, the court concluded that the Tennessee Valley Authority (TVA) is "free to ignore the ACO" because such orders "are legally inconsequential and do not constitute final agency action." *Id.* at 3a. The court's holding that a substantial part of the EPA enforcement scheme is unconstitutional rests on a mistaken reading of the Clean Air Act, threatens the integrity of an important component of the Act's enforcement scheme, and conflicts with a decision of this Court and decisions of two other courts of appeals. Moreover, the court's mistaken constitutional holding was compounded by its error in rejecting two threshold obstacles to this suit. Further review is warranted.[1]

[1] Respondents erroneously suggest (*e.g.*, TVA Br. in Opp. 2 n.1) that newly promulgated regulations demonstrate that TVA's conduct did not violate the Clean Air Act. Those regulations, which have been stayed

I. EPA WAS NOT THE "PREVAILING PARTY"

TVA argues that further review is unwarranted because the Eleventh Circuit dismissed TVA's petition for review and, in TVA's view, EPA therefore prevailed below. In support of that contention, TVA cites (Br. in Opp. 7) the Court's statement in *Mathias* v. *WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam), that "[a]s a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."

Contrary to TVA's assertions, however, EPA was not a prevailing party below in any meaningful sense, and EPA is not seeking review of a "favorable judgment." The court of appeals invalidated a key aspect of EPA's enforcement authority under the Clean Air Act. That unfavorable holding is an integral and essential element of the judgment entered below.

Moreover, the statute authorizing certiorari jurisdiction in this case allows "any party" to seek certiorari and is not limited to non-prevailing parties. 28 U.S.C. 1254(1). In *Mathias*, the Court was careful to point out that the petitioners in that case were "seek[ing] review of uncongenial findings not essential to the judgment and not binding upon them in future litigation." 535 U.S. at 684.[2] When, as here, the judgment below is based on adverse holdings that *are* essential to the judgment and *are* binding in future litigation, there is no bar to this Court's grant of a petition for certiorari.

This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), considered an analogous issue in the context of the Court's appellate jurisdiction under now-repealed provisions

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pending judicial review, have no relevance to this case, because they are exclusively prospective in effect. See Pet. 3 n.1.

[2] The Court in *Mathias* cited *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934) (per curiam). That case involved an appeal, not a petition for certiorari. Even in that context, the Court's rationale for dismissing the appeal was not unqualified. The Court noted, as it did in *Mathias*, that the unfavorable aspects of the judgment sought to be appealed "are not to be regarded as *res judicata*" in future proceedings. *Ibid.*

of 28 U.S.C. 1252 (1982).[3] In that case, certain parties filed a motion to dismiss the government's appeal on the ground that the INS was not an "aggrieved party" because the INS had "sought the invalidation of [the statute at issue] and the Court of Appeals granted that relief." 462 U.S. at 930. The Court refused to dismiss the appeal, holding that "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal." *Id.* at 931. That principle applies *a fortiori* to cases involving certiorari. Indeed, in the context of certiorari *before* judgment, the Court has repeatedly construed Section 1254(1) to authorize review even at the request of a party who has prevailed. See *United States* v. *Nixon*, 418 U.S. 683, 686 & n.1 (1974) (citing cases).

Under those principles, EPA is an aggrieved party entitled to petition for certiorari in this case. The court of appeals held that, although the Clean Air Act authorizes penalties for violation of ACOs, that portion of the Act is unconstitutional. That holding was essential to—indeed, it provided the sole basis for—the court's dismissal of TVA's petition for review, and it effectively precludes EPA from obtaining civil penalties for violations of Clean Air Act ACOs in the Eleventh Circuit. Accordingly, there is no bar to granting EPA's petition for certiorari in this case.

II. THE COURT OF APPEALS HELD AN ACT OF CONGRESS UNCONSTITUTIONAL BASED ON A MISINTERPRETATION OF THE CLEAN AIR ACT

The court of appeals' constitutional decision was based on its conclusion that "[t]he problem with ACOs stems from their injunction-like legal status coupled with the fact that

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[3] Cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 70 n.5 (1977) (noting that grant of certiorari petition at request of prevailing party "may * * * appear anomalous" but concluding that issue need not be addressed because of ruling vacating judgment below on certiorari petition filed by losing party).

they are issued without an adjudication or meaningful judicial review." Pet. App. 6a-7a. As explained in the petition (at 13-15), the merits of an EPA ACO under the Clean Air Act are *always* subject to meaningful judicial review. The court of appeals erred in finding a preclusion of judicial review in the Clean Air Act, especially in light of the need for courts to attempt to preserve—not impugn—the constitutionality of statutes.

A. TVA does not defend the court of appeals' conclusion that meaningful judicial review of EPA orders is unavailable. Instead, TVA argues (Br. in Opp. 23) that "[t]he Eleventh Circuit's due process ruling is not premised on the absence of judicial review," but rather on "the absence of any statutory procedures for adjudication before a final ACO that creates liability for past conduct is issued." TVA is mistaken.

The court of appeals never suggested that the absence of statutorily mandated agency procedures alone would have been sufficient to support its holding of unconstitutionality. To the contrary, the court repeatedly emphasized that the lack of opportunity for effective judicial review of EPA orders under the Clean Air Act was essential to its holding. The court stated that the problem was that orders are "issued without adjudication *or* meaningful judicial review," Pet. App. 6a; that, in a judicial proceeding, the recipient of an order "does not have a chance to contend that the EPA has an incorrect view of the facts and law," *id.* at 11a; that the recipients of the order therefore "never get an opportunity to argue, before a neutral tribunal, that [there has been no violation]," *ibid.*; and that "[t]he only real inquiry" in a judicial action regarding an EPA order "is whether the Administrator possessed 'any information'—a standard that is less rigorous than the 'probable cause' standard found in the criminal law setting," *id.* at 30a. In the court's view, "[w]hether the Administrator's facts are too thin to warrant an adjudicated finding" of a violation "is irrelevant as far as ACOs are concerned." *Ibid.*

The court of appeals relied on those descriptions of the Act's supposed preclusion of effective judicial review to reach its ultimate conclusion that the Act is unconstitutional. As TVA states (Br. in Opp. 25), the court also referred to the requirement of "a full and fair hearing before an impartial tribunal." Pet. App. 43a. But the court found that the opportunity for such a hearing was lacking because of its mistaken view that no judicial tribunal could meaningfully review the substance of an EPA order under the Clean Air Act. Moreover, the court's alternative separation-of-powers holding was equally clearly based on its conclusion that "*[w]ithout meaningful judicial review*, the scheme works an unconstitutional delegation of judicial power." *Id.* at 45a (emphasis added). See also *ibid.* (courts may review only "whether the Administrator based her decision to issue the ACO based upon 'any information' as opposed to no information at all.'"). The court of appeals' constitutional holdings thus rest on its conclusion—not defended by TVA—that the Act does not permit meaningful judicial review of Clean Air Act orders.

Perhaps TVA means to argue that the lack of mandatory statutory procedures for the issuance of Clean Air Act orders is sufficient to establish a violation of the Due Process Clause, even if meaningful judicial review is available. The Act itself, however, expressly grants the recipient of an order "an opportunity to confer with the Administrator concerning the alleged violation" before an order may take effect, 42 U.S.C. 7413(a)(4); the agency may adopt such further procedures as are appropriate (especially to save the Act from unconstitutionality, see Pet. 15 n.5); and the availability of meaningful (and appropriately tailored) judicial review would be sufficient to ensure due process for the recipient in any event. In this case, in particular, TVA's complaints about the lack of a statutorily mandated procedure could not be sufficient to support the court of appeals' holding, both because TVA in fact had the benefit of a full agency adjudication, with substantial procedural protections and hearings,

and because TVA is not a "person" protected by the Due Process Clause. See Pet. 4-5, 15 n.5. In any event, the court of appeals did not rest its decision on the principle now advocated by TVA. Further review is warranted to address the court of appeals' conclusion—apparently not supported by any party to this case—that the Clean Air Act's scheme for enforcement of administrative orders is unconstitutional because it precludes effective judicial review of those orders.

B. TVA correctly points out (Pet. 18-19) that, under 42 U.S.C. 7607(a) and (b), if an EPA order is subject to judicial review in a pre-enforcement action, it is not subject to such review again in an enforcement action. See Pet. 15 n.4. TVA argues that the government has taken the position that a Clean Air Act order is subject to review in an enforcement action, and that it follows necessarily that the order in this case is not subject to review in this pre-enforcement action.

TVA misreads the government's position. The government's position is that all Clean Air Act orders, including the one in this case, are subject to meaningful judicial review at some stage before noncompliance penalties can be imposed. Insofar as a Clean Air Act order is final, the court may fully review its validity at the pre-enforcement stage. Indeed, in direct conflict with the court of appeals' holding in this case, the Supreme Court conducted exactly that sort of careful judicial review in *Alaska Department of Environmental Conservation* v. *EPA*, 124 S. Ct. 983 (2004). See Pet. 16-17.[4] Insofar as an order is otherwise not final, it is subject to review in a subsequent civil enforcement action. See, *e.g.*,

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[4] As explained in the petition (at 17-19), the decision in this case also conflicts with *Allsteel, Inc.* v. *EPA*, 25 F.3d 312 (6th Cir. 1994), and *Alaska Department of Environmental Conservation* v. *EPA*, 244 F.3d 748 (9th Cir. 2001), aff'd, 124 S. Ct. 983 (2004), each of which held that the EPA order at issue was final and subject to review. TVA argues (Br. in Opp. 22) that the conflict is not real, because those courts "fail[ed] to grapple with the constitutional problems" perceived by the court of appeals in this case. They did not do so, however, because they did not agree with the implausible conclusion that the Clean Air Act precludes effective judicial review of EPA orders.

Solar Turbines, Inc. v. *Seif*, 879 F.2d 1073, 1078 (3d Cir. 1989). Cf. Pet. 14 n.3 (noting that 42 U.S.C. 7413(e)(1) provides that the district court "shall" before imposing penalties consider "such * * * factors as justice may require"). In either event, the court of appeals erred in concluding that an EPA order under the Clean Air Act is not subject to meaningful judicial review. The fact that in some cases that review occurs at the pre-enforcement stage and in other cases only in an EPA enforcement action is of no consequence for the instant dispute.

C. TVA argues (Br. in Opp. 20) that the court of appeals' decision leaves "EPA's enforcement powers * * * intact," because EPA retains other enforcement mechanisms. Even the court of appeals, however, recognized the "unavoidable conclusion that Congress did, in fact, authorize the issuance of ACOs with the status of law." Pet. App. 4a. Congress thus viewed the issuance of compliance orders enforceable by civil penalties—not merely the ability of EPA "to serve notice of EPA's position in order to obtain voluntary compliance with the law," TVA Br. in Opp. 21—as essential for EPA's functions. As the petition notes (Pet. 18), EPA issues administrative orders under various environmental statutes more than a thousand times each year. Without the threat of potential noncompliance penalties for orders under the Clean Air Act (and perhaps other statutes), the utility of this enforcement mechanism would be dramatically reduced or eliminated. The court of appeals' holding that, despite Congress's clear intent, order recipients are "free to ignore" ACOs (Pet. App. 3a) warrants further review.

III. THE THRESHOLD ISSUES ALSO MERIT REVIEW

Further review is also warranted of the two threshold issues resolved by the court of appeals: whether this dispute between TVA and EPA presents an Article III case or controversy, see Pet. 18-23, and whether TVA had independent litigating authority to file the petition for review in this case over the objection of the Attorney General, see Pet. 23-27.